

DECISION



12399 J. N. [unclear] Page II
THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D. C. 20548

FILE: B-193877

DATE: December 31, 1979

MATTER OF: 1 Pace Incorporated D.3538

DIGEST: [Protest Alleging That Awardee's Proposal Was Not Responsive to Solicitation Provision]

Solicitation provision which specifies item by brand name and which permits offers by other than approved source if, inter alia, offeror furnishes data concerning item proposed to be furnished to permit determination of item acceptability, allows agency to accept item not identical to that specified. Consequently, specified-name manufacturer should have been on notice that procurement was not necessarily limited to specified item. Nonetheless, solicitation provision was somewhat confusing and GAO recommends that provision be clarified for future use.

2 Pace Incorporated (Pace) protests the award of a contract to Automated Production Equipment and Supplies (APES), a lower-priced offeror under request for proposals (RFP) No. F41608-78-R-1322, issued by Kelly Air Force Base, Texas. The solicitation requested offers for 124 power units described in the schedule as Pace part number 7008-0021. D.3539 87

Pace alleges that APES' unsolicited proposal, which offered APES' Model PRS 475, subject to certain modifications requested by the Air Force, was not responsive to the solicitation's purchase description which restricted the procurement to the specified Pace part number, and did not include a "brand name or equal" provision or any other indication that alternative items might be considered.

While not disputing that the APES item is in fact "equal," Pace alleges that it was misled into submitting its offer solely on the basis of the specified equipment whereas APES was given an unfair competitive

~~008165~~ 111175

advantage since it was permitted to offer substitute equipment. Pace asserts that it is able to supply other power sources which perform, in all material respects, the same function as the equipment specified by the solicitation.

The Air Force states that Section D-2 of the RFP, entitled "Required Source Approval," sufficiently apprised prospective offerors that items other than the specified Pace part would be considered and approved, provided they met the criteria established in Section D-2.

The Air Force submits that restriction of the procurement to the Pace part number, to the exclusion of previously unapproved sources which could otherwise qualify, would be at variance with our decision in Rotair Industries, et al., 58 Comp. Gen. 149 (1978), 78-2 CPD 410, and points out that our Office has acquiesced in the award of contracts to previously unlisted suppliers that subsequently qualified for award in 52 Comp. Gen. 546 (1973) and Delta Scientific Corporation, B-184401, August 3, 1976, 76-2 CPD 113.

In view of its position that the solicitation adequately informed offerors that substitute items from other offerors qualifying as approved sources under the provisions of Section D-2 would be considered, the Air Force argues that any objection by Pace to that section of the RFP or to its failure to describe the salient characteristics of units being acquired on a "brand name or equal basis," must be considered untimely under our Bid Protest Procedures, 4 C.F.R. Part 20 (1979). Section 20.2(b)(1) of our procedures requires that protests of improprieties apparent in an RFP must be filed prior to the closing date for receipt of proposals.

We do not agree that the protest is untimely. The essence of Pace's protest is not that the solicitation provision was improper or failed to include the salient characteristics of items being acquired on a brand name or equal basis but that the item procured does not meet

the solicitation requirements. Since Pace's protest was filed within 10 days of the award to APES, it is timely.

Section D-2 of the subject RFP provides in part:

"D-2. REQUIRED SOURCE APPROVAL:

(a) The source(s) listed below have been approved by the Government for supply of the spare/component parts called for herein in order to assure the requisite safe, dependable, effective operation and support of military equipment. Offerors other than the below listed approved source(s) will NOT be considered for award under this solicitation UNLESS:

(1) The offeror submits prior to or concurrent with its proposal proof of prior Government approval as a supplier of the required item(s); OR

(2) The offeror submits prior to or concurrent with its proposal evidence of having satisfactorily produced the required item(s) for the Government or the prime equipment manufacturer(s); OR

(3) The offeror submits prior to or concurrent with its proposal a certification specifying that the required item(s) will be obtained from sources having current Government approval as a result of satisfactorily supplying the same item(s) to the Government or the prime equipment manufacturer(s); OR

(4) The offeror submits prior to or concurrent with its proposal such complete and current engineering data for the item(s) including manufacturing control drawings, qualification test reports, quality assurance procedures, etc. as may be required for evaluation purposes to determine the acceptability of the item as supplied by your firm for Government use; OR

(5) The offeror, who is not the manufacturer, notifies the procuring contracting

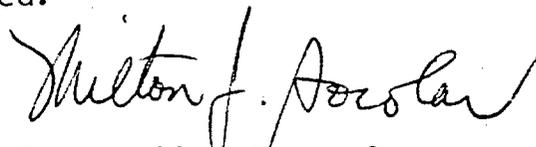
officer (PCO) at least 10 days prior to the opening of bids or proposals that he intends to provide surplus parts manufactured by one of the approved sources listed below. The Government will determine on a case-by-case basis, whether or not surplus parts can be considered in view of the criticality of the parts, and the extent of the evidence necessary for the offeror to establish that the parts conform to the applicable specifications."

Paragraphs (1), (2), (3) and (5) of this section set forth a detailed description of the circumstances under which offers from sources other than those listed as an approved source may be considered. We believe, however, that it is paragraph (4) which permits the Air Force to do what it did here, that is, to accept an item different from that listed. Paragraph (4), as we read it, permits an offeror to furnish an item not identical to the specified brand name item if it can also furnish adequate data to permit the Air Force to evaluate the item to determine its comparability and overall acceptability. The protester's position, that the "item" referred to in this paragraph must be identical to the specific part listed in the solicitation, we find to be unrealistic as the solicitation clearly permits the qualification of an item manufactured by other than the approved source and we do not believe it is likely for an item manufactured by two independent sources to be identical in every aspect. Thus we believe a reasonable reading of paragraph (4) is that it provides for the qualification of an item other than that listed in the RFP if the item offered performs in a technically acceptable manner. There is no requirement in paragraph (4) or elsewhere in section D-2 that the offered item be identical. Moreover, this interpretation is consistent with our prior holdings that an RFP specifying only a particular brand name item does not preclude an award to a company offering an equivalent product. See, e.g., Federal Data Corporation, B-192549, April 6, 1979, 79-1 CPD 241.

Thus, we believe that a careful analysis of each portion of Section D-2 should have put Pace on notice that another item could have been accepted. Nevertheless, we find Section D-2 to be somewhat confusing

on this point as the one paragraph which concerns the qualification of alternate items is obscured by the preceding and following paragraphs which concern alternate sources. We are recommending by letter of today to the Secretary of the Air Force that the clause language be clarified for future use. In addition, we are also informing the Secretary that it would be a good practice in situations such as this, where an unlisted "equivalent" item is determined to be acceptable, and where time permits, to amend the RFP to list the new item as an approved source item to provide other offerors a convenient opportunity to submit an offer on the equivalent item.

The protest is denied.



For The Comptroller General
of the United States